

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**923 SECOND APPEAL NO.318 OF 2021
WITH
CA/7886/2021 IN SA/318/2021**

ATMARAM ASHRUBA SARKATE AND ORS
VERSUS
VITTHAL GULABRAO GAIKWAD

...
Advocate for Appellants : Mr. Palodkar Devdatt P.
Advocate for Respondent : Mr.Munde Suresh W.

...

**CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 09-09-2021.**

ORDER :

1. Present appeal has been filed by the original defendants to challenge the Judgment and decree passed in Regular civil Appeal No.111 of 2015 passed by learned District Judge-4, Jalna on 05-03-2021 whereby the appeal filed by the present respondent/original plaintiff came to be allowed. The First Appellate Court has reversed the decree that was passed by the learned Trial Judge i.e. Civil Judge Junior Division, Mantha Tq. Mantha Dist.Jalna in Regular Civil Suit No.57 of 2012 on 30-07-2015.

2. The present respondent/original plaintiff filed the said suit for perpetual injunction which came to be dismissed. The plaintiff was

contending that he is the owner of land admeasuring 84 R Gut No.219 situated at village Talni Tq.Mantha Dist.Jalna which he had purchased from one Suresh Shankarrao Bhaskar on 10-01-1989. Defendants No.1 to 3 are the adjacent land holders. Land of defendants No.1 and 3 is situated towards Eastern side and the land of defendant No.2 is towards Northern side. It was contended that there is a common bandh (boundary) to their lands. According to the plaintiff, there was obstruction to his possession over the suit land by the defendants on 25-07-2012 when they have tried to demolish the common bandh. Hence, he filed the suit.

3. Defendants No.1 to 3 resisted the claim by filing written statement. They denied the averments about act of trying to demolish the common bandh. In fact, they contended that the plaintiff has encroached on 16 R area of Gut No.187 of defendant No.1 and in fact defendant No.1 got that measurement done on 25-07-2012. On that day, there was marking of his boundaries.

4. The learned Trial Judge held that the plaintiff has partly proved that he is in possession of the suit property, however, it was held that the plaintiff has failed to prove that the defendants are obstructing his possession and, therefore, suit was dismissed. He

challenged the said Judgment and decree as aforesaid in Regular Civil Appeal No.111 of 2015. The learned First Appellate Court held that the plaintiff has proved his possession over the suit land. He has also proved that the defendants are obstructing his possession over the suit property and, therefore, by reversing the decree passed by the Trial Judge, the appeal was allowed and the suit came to be decreed.

5. Heard learned Advocate Mr. D. P. Palodkar for appellants and learned Advocate Mr. S. W. Munde for respondent.

6. It has been submitted on behalf of the appellants that both the Courts below have not exercised their powers under Order 26 Rule 9 of the Code of civil Procedure to get a admitted map on record, when the defendants had come with a case that there is encroachment by the plaintiff to the extent of 16 R on the land of defendant No.1. He placed his reliance on the decisions of this Court in *Raghunath Kashinath Chavan vs. Sakharam Maroti Chavan and Another*, reported in 2019(3) *Mh.L.J.* 183, and *Sudhakar s/o Baburao Kulkarni vs. Gorabai w/o Thansing Marag and others*, reported in 2019 (6) *Mh.L.J.* 287, to support his contention that such measurement ought to have been done. Further, he submitted that

the admissions given by the plaintiff and his witnesses in his cross-examination have not been considered. If those admissions are considered then it can be seen that the cause of action itself was not proved. The plaintiff had admitted that since defendant No.1 got his land measured on 25-07-2012, he was under apprehension and then it led to the filing of the suit. He also admitted that in the said measurement, the Taluka Inspector of Land Records has reported that plaintiff has made encroachment to the extent of 16 R land of the defendant. He also admitted that after 25-07-2012, the defendants have not demolished the common bandh and voluntarily he had stated that the reference in respect of demolition of bandh in his suit is not correct. The learned First Appellate Court failed to take into consideration these admissions which would definitely show that there was absolutely no cause of action for the plaintiff to file the suit, yet taking a contrary view which can be said to be perverse to the record of the suit, slam the order of injunction against the defendants. Therefore, substantial questions of law are arising in this case.

7. Per contra, the learned Advocate for respondent supported the reasons given by the First Appellate Court and submitted that the

alleged admissions by the plaintiff cannot be considered the way the appellant intends to interpret. In fact, though contention was raised by the defendants that the plaintiff has made encroachment to the extent of 16 R land, yet they had not examined the Taluka Inspector of Land Records or the Cadastral Surveyor who measured the land. When the possession of the plaintiff over 84 R land was proved and it was on the basis of the sale deed, it has been protected by allowing the appeal and decree in the suit. No substantial questions of law as contemplated under Section 100 of the Code of Civil Procedure are arising in this case.

8. At the outset, note of the decision in *Balasubramanian & Anr. vs. M. Arockiasamy (dead) Through LRs. (Civil Appeal No.2066 of 2012, decided by Hon'ble Supreme Court on 2nd September 2021)* is required to be taken a note of, wherein it has been observed in paragraph No.15 that :-

"In view of the above, although the counsel for the appellant may be technically correct in his submission that the High Court erred in not clearly answering the question of law framed by it under Section 100 of the CPC, the High Court was still within its jurisdiction to determine whether the reading of the evidence on record by one of the Courts below was perverse.

Question of law for consideration will not arise in abstract but in all cases will emerge from the facts peculiar to that case and there cannot be a strait jacket formula. Therefore, merely because the High Court refers to certain factual aspects in the case to raise and conclude on the question of law, the same does not mean that the factual aspect and evidence has been reappreciated.”

Therefore, the cursory reference to the facts and the interpretation of the evidence is definitely required to be considered here to come to a conclusion that whether the Court, as tried to be submitted on behalf of the appellant, had perverse approach towards the evidence.

9. The suit was for injunction and admittedly in the written statement there was counter claim for removal of encroachment and possession. Both the Courts below were right in not exercising their powers under Order 26 Rule 9 of the Code of Civil Procedure. The fact in issue was restricted to whether plaintiff proves his possession over 84 R land, as claimed by him. It could not have been beyond his 84 R land on which the boundaries were described in his sale deed which was produced on record. As regard the 16 R land which is stated to be in possession of the plaintiff belonging to defendant

No.1, it being not the subject matter of the suit, question of exercising powers under Order 26 Rule 9 of the Code of Civil Procedure, does not arise. The cases cited by the learned Advocate for the appellants are on different points and in those cases the suit was for removal of encroachment and for possession. Therefore, no substantial question of law on this point, is arising in this case.

10. Much has been harped as regards the admission given by the plaintiff in his cross-examination. At the outset, it can be said that even the apprehension can be taken as a cause of action. It is not even necessary that it should be coupled with actual act of demolition of the bandh in this case. Therefore, defendants/present appellants cannot get advantage of the voluntary statement of the plaintiff that the contention in his plaint regarding demolition of bandh is not correct. Further, if we see the plaint, it has been stated that defendants No.1 to 3 started act of demolition of the common bandh on 25-07-2013. Starting odes not mean that it has been completed. No question to that effect as to how much length of bandh was demolished, has not been asked in the course. Now as regards encroachment is concerned, as aforesaid, the defendants have not examined Cadastral Surveyor. Though the plaintiff admits

that in the Taluka Inspector of Land Records measurement he has been shown to have encroached on 16 R land of defendants, this cannot be taken as an admission of the actual fact about the encroachment. There was no straight question that such encroachment has been made by him. Whatever has been shown by the Taluka Inspector of Land Records in his report, has been admitted by him in his cross-examination. However, we cannot also forget another admission by the plaintiff that he has sold 1 R land from the encroached portion to one Baburao Rathod. In fact, when that has been sold, has not been asked nor any documentary evidence to support that fact appears to have been produced on record. Further at the outset, it can also be seen that in the written statement it appears that the defendants have stated that the encroachment of 16 R land is from the land of defendant No.1 i.e. Gut No.187. As per the plaint, that area is towards the Eastern side of the suit property. The defendants have not given the approximate year as to when the plaintiff took possession of that 16 R land. Till the matter was before the First Appellate Court, it appears that no suit was filed by the defendants to seek possession of that land and this fact has been considered by the First Appellate Court.

11. As regards the cause of action is concerned, as aforesaid, even the apprehension in the mind of plaintiff is sufficient. That apprehension appears to be justifiable as appropriate reasoning have been given by the First Appellate Court to come to a conclusion that the said apprehension or cause of action has been proved. The defendants are contending that they never obstructed to the plaintiff in respect of his 84 R land. Statement to that effect has also been made by the defendants witness and even while making submissions before this Court, the said fact has been reiterated. We are require to take into consideration the position on the date of the suit in co-relation to the cause of action shown in the plaint. He has stated that the defendants used to say to him that he has made encroachment on their land and then according to him the defendants started to demolish the common bandh on 25-07-2012. Therefore, that apprehension was sufficient for him to file the suit and it has been taken by the First Appellate Court while assessing the evidence as the obstruction to the possession of the plaintiff over the suit land i.e. 84 R land.

12. As aforesaid, in *Balasubramanian & Anr vs. M. Arockiasamy (Supra)* the aforesaid observations have been made and, therefore,

this Court has considered the facts just to ensure that the conclusion of the First Appellate Court is whether perverse or not. In *Ramathal vs. Maruthathal & Ors.*, reported in (2018) 18 SCC 303, the Hon'ble Supreme Court has held that :-

“In such a case where such concurrent factual finding was rendered by two Courts and in such situation, it has been interfered with by the High Court in second appeal, the Hon'ble Supreme Court was of the view that the interference was not justified.”

However, in that case itself Hon'ble Supreme Court indicated that such restraint against interference is not absolute rule but when there is perversity in findings of the Court which are not based on any material or when apprehension of evidence suffers from material irregularity the High Court would be entitled to interfere on a question of fact as well. Therefore, reiterating the fact that this Court has made detailed discussion on the facts also just to arrive at a conclusion as to whether the First Appellate Court has taken a perverse view. But the reasons are clear and it is based on the facts and the evidence on record and, therefore, merely because a second view is possible, this Court cannot go into that aspect. Reliance can be placed on the decision in *P. Velayudhan & Ors. vs. Kurungot*

Imbichia Moidu's son Ayammad & Ors. Reported in (1990) Supp. SCC 9 and Tapas Kumar Samanta vs. Sarbani Sen & Anr., reported in (2015) 12 SCC 523, wherein it has been held that,

"In a second appeal the High Court would not be justified in interfering with the finding of fact made by the First Appellate Court since such finding rendered would be based on evidence."

13. The proposed substantial questions of law as stated in the appeal memo are not arising in view of the above said discussion and, therefore, in view of *Kirpa Ram (since deceased through L.Rs.) and Others vs. Surendra Deo Gaur and Others, reported in 2021 (3) Mh.L.J. 250*, the second appeal stands dismissed. The pending civil application also stands dismissed.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-